

ASSEMBLY BILL

No. 752

Introduced by Assembly Member Plescia

February 19, 2003

An act to add Section 11580.045 to the Insurance Code, relating to insurance for construction defects.

LEGISLATIVE COUNSEL'S DIGEST

AB 752, as introduced, Plescia. Construction defects: additional insureds.

Existing law provides that any additional insured endorsement issued by an admitted or nonadmitted insurer for the benefit of a public agency regarding certain construction contracts, as specified, shall not provide any duty of indemnity coverage for the active negligence of the additional insured in specified instances.

This bill would provide that any endorsement issued by an admitted insurer or nonadmitted insurer and governed by the Insurance Code that names an individual or entity as an additional insured under any insurance policy that is collateral to, or affects, any residential construction contract governed by the legal requirements for actions for construction defects, as specified, shall only provide the additionally-named insured individual or entity with a defense for those claims arising from or related to, the named insured's activities. The bill would also provide that any endorsement or interpretation of an endorsement that purports to grant a greater duty to defend the additionally-named insured shall be void and unenforceable as a matter of public policy. The bill would also set forth the findings and declarations of the Legislature in this regard.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. (a) The Legislature finds and declares, as
2 follows:

3 (1) In *Presley Homes, Inc. v. American States Ins. Co.* (2001)
4 90 Cal.App.4th 571 (hereafter *Presley Homes*), the Court of
5 Appeal held that the insurer of only two of many subcontractors
6 was required, under its additional insured coverage, to pay all the
7 costs of defending the real estate developer against construction
8 defect claims, including claims arising from the actions of other
9 subcontractors insured by other insurers.

10 (2) The Court of Appeal in *Presley Homes* held that, regardless
11 of the reasonable expectations of the parties to the insurance
12 contract provided to the two subcontractors with respect to the
13 insurer's duty to defend the real estate developer against claims
14 arising from the actions of other subcontractors insured by other
15 insurers, the insurer's duty to defend extended to the entire action
16 and not just to those claims arising out of actions of its insured
17 subcontractors.

18 (3) The Court of Appeal in *Presley Homes* stated that its
19 holding was based on the California Supreme Court decision in
20 *Buss v. Superior Court* (1997) 16 Cal.4th 35 (hereafter *Buss*),
21 concluding that "... an insurer's duty to defend the entire action is
22 based on public policy, not the terms of the parties' contract."

23 (4) The Court of Appeal in *Presley Homes*, however,
24 misconstrues the California Supreme Court decision in *Buss*,
25 which specified its holding to be based on contractual law,
26 declaring that "... in a mixed action, in which some of the claims
27 are at least potentially covered and the others are not, the insurer
28 has a duty to defend as to the claims that are at least potentially
29 covered, having been paid premiums by the insured therefor, but
30 does not have a duty to defend as to those that are not, not having
31 been paid therefor ...".

32 (5) Accordingly, the California Supreme Court in *Buss* held
33 that an insurer has no right to seek reimbursement from the insured
34 as to claims that are at least potentially covered, as it bargained to
35 bear these costs, but may seek reimbursement from its insured as



1 to the claims that are not even potentially covered, as it did not
2 bargain to bear these costs.

3 (6) The facts in Presley Homes draw no parallel, as they
4 involve multiple subcontractors (insureds) and multiple insurers,
5 each of whom bargained only for the potential claims against its
6 insured, and not potential claims against other subcontractors
7 protected by other insurers.

8 (7) The decision in Presley Homes ignores the dynamic of the
9 construction industry that would expose the insurer for a small
10 subcontractor to defense costs for claims against the general
11 contractor or a real estate developer and a multitude of unrelated
12 subcontractors doing unrelated works of improvement, an
13 open-ended exposure that no insurer would knowingly undertake,
14 at least at premiums that a small subcontractor could justifiably
15 afford.

16 (b) Because the Legislature is entrusted by the people of the
17 State of California with the duty to enact laws for the public good
18 and to declare the public policy of this state, the Legislature hereby
19 enacts Section 11580.045 of the Insurance Code as a matter of
20 public policy necessary to protect the needs of construction
21 subcontractors to acquire affordable, bargained for, additional
22 insured coverage as required by general contractors and real estate
23 developers in the current construction industry.

24 SEC. 2. Section 11580.045 is added to the Insurance Code, to
25 read:

26 11580.045. Any endorsement issued by an admitted or
27 nonadmitted insurer and governed by this code that names an
28 individual or entity as an additional insured under any insurance
29 policy that is collateral to, or affects, any residential construction
30 contract governed by Title 7 (commencing with Section 895) of
31 Part 2 of Division 2 of the Civil Code relative to construction
32 defects, shall only provide the additionally-named insured
33 individual or entity with a defense for those claims arising from,
34 or relating to, the named insured's activities. Any endorsement or
35 interpretation of the endorsement that purports to impose a greater
36 duty to defend the additionally-named insured shall be void and
37 unenforceable as a matter of public policy.

